

Region V

Midwestern States

Regulatory Enforcement Fairness Hearing

Indianapolis, Indiana

December 4, 2001

P R O C E E D I N G S

**Michael Barrera:** We are going to first call up Bill Sugars.

**William A. Sugars:** First of all, before I begin, I would like to thank certain people for making this opportunity available to me. I would like to thank our Congressman, Mark Kirk from the 10<sup>th</sup> District in Illinois and his Chief of Staff from his local office, Ed Kelley. They put me in touch with Michael's office. I would like to thank Michael Barrera and Lyle Clemenson, they have been exceptional in their help in uncovering an avenue for me to voice my concerns and complaints and get fast resolution. I would also like to thank the quick response from Annabelle Lockhart of the Wage and Hour division of the U.S. Department of Labor and June Robinson who is the Director of the Small Business Program, because they, even though I have not received any hard copies of the ruling, they did give me the exemption which I asked for in my testimony. I just got that as I was coming down here. So. But my testimony deals with the process, not the results. I did expect the result and again I thank the Department of Labor Wage and Hour Division for their fast action.

**William A. Sugars:** My name is William A. Sugars. I am co-owner of Libertyville Brewing Company doing business as Mickey Finn's Brewery. I worked in the healthcare industry for 18 years before leaving corporate America to build the first brewpub in Lake County, Illinois.

Since opening our doors in 1994, I have been involved for many years with the local business community, and currently am the Chairman of the Board of the Green Oaks Libertyville, Mundelein, Vernon Hills area Chamber of Commerce. I am also on the board of directors of the Lake County Convention and Visitors' Bureau. I am an advisor to Mainstreet Libertyville, one of the founders of the Illinois Craft Brewers Guild and a member of the Lake County Restaurant Association. In addition, Mickey Finn's Brewery by way of brewpub is a restaurant that makes beer on its premises. So we make beer and sell it along with our food. Last year we had the 17<sup>th</sup> largest single location brewpub in the U. S. Lake County, Libertyville, in particular, drinks a lot of beer. Mickey Finn's Brewery was featured in 1997 as a subject of a 30 minute program on PBS's Small Business 2000 Series. This program is still being shown today. As a brewpub we have and continue to win National and International awards for our beer and have had articles written about us as an example as to how to properly run a brewpub. I mention these facts as examples of giving credit to us and my organization that we do know how to run a business and make it successful. The reason I am here today before you is to make you aware of areas within the U.S. Department of Labor that make it next to impossible for small businesses to air their grievances toward restrictive and out-of-date regulations. The atmosphere of attempted intimidation and threats that I experienced are not acceptable in this country where small business

and entrepreneurship are the backbones of our country and should be nurtured and supported. I would like to mention also that I made this trip to testify because what I experienced was wrong. It is just plain wrong. It is counterproductive to working relationships between government and small business. I do not, as I am sure everybody here, have idle time on our hands to pursue this matter. We are starting the holiday season. The slow down in the economy requires my full attention to keep our business profitable. We have spent approximately \$7,000 on attorney's fees that we could use elsewhere, and my partner is unable to work because of health conditions. I again emphasize the reason I am here is the need for change that exists within certain regulatory agencies. The issues I wish to address are a narrow-minded field investigator who is unwilling to listen to presented information; guidelines on wages that have not been updated or relate to doing business categories; and as I understand it, the Wage and Hour laws were written way before brewpubs came into existence. I would also like to address the issue of reimbursement for legal fees that I have had to spend to this point.

On June 4, 2001, we received a visit by the U.S. Department of Labor's Wage and Hour Division local investigator, Randall E. McRae from the Gurney, Illinois office. This was his second visit, the first being in 1996. At the conclusion of this investigation, I was told by Mr. McRae that Libertyville Brewing Company would be written up and owe thousands of dollars in back wages for non-compliance in how we compensate our brewery staff. I was told that according to the Labor Department, my brewery staff (two people) is not exempt and we must keep daily time records and they could not be salaried employees. I disagreed with him and tried to tell him the role that brewers have in running the total business, not just the brewery. In addition, trying to keep daily time records is not practical based on their brewery schedule, as we would not be able to verify their accuracy. Brewers brew when we have to brew. We do not brew 8:00 to 5:00 every day, so sometimes they brew in the morning, sometimes they brew at night, sometimes they don't brew at all. As I understand it, the labor laws have been in place long before brewpubs came into being. I previously mentioned that a brewpub is simply a restaurant that brews its beer on-site to serve its customers. I have affidavits which I can make available that explain how the brewers job is very involved, and the amount of time our brewers spend brewing is less than 50% of their time. The brewers are part of our total restaurant management team. This is well documented in the legal opinion that accompanies this written testimony and the available affidavits that the brewer's position fits the criteria for exempt status. We run our business and structure our employees to create a team concept. Other brewpubs may do it differently, but that is their choice. We also compensate our brewers very well and incorporate into their salaries and benefits for time spent past the normal 40 hour work week. Before I begin my dialogue on how poorly conducted this investigation was, let me say I am fully supportive of the purpose of the U.S. Department of Labor. The agency is there to ensure that the nation's workforce is treated properly and compensated fairly. What we are experiencing at Mickey Finn's Brewery

is an employee who has decided to implement judgment without understanding the situation he is reviewing. I feel that Mr. McRae was unwilling to understand how our business runs and decided that there could be no interpretation of his manual that would recognize how our business operates. He spent little time, maybe 20 to 30 minutes, with our brewers, both of whom told me that he never tried to understand their job which would have shown they do fit the criteria for exempt status. It was as if in his mind they brewed beer and nothing else, no matter how they tried to show him the full scope of their job. Mr. McRae made a comment that concerns me, and I think sheds light on his attitude toward making a common sense decision; on discussing my position on brewers compensation he said to me he only has a couple of years before retirement and then he plans to make a lot of money by having a Labor Law consulting company. He said that nobody understands or is familiar with the labor statutes and the complexity and confusion they cause businesses who will give him an available customer base. In addition, during our discussion he spent most of the time, 15 to 20 minutes, talking about his upcoming vacation to Las Vegas and how much he likes the area and can't wait to retire and spend more time up there. Our lawyer sent Mr. McRae a legal opinion, dated June 7, 2001, which gave basis for exempting our brewers under the Fair Labor Standards Act. A copy of this opinion does accompany my testimony. On June 12, 2001, Mr. Barry Chaet, our lawyer spoke to Mr. McRae in regard to the legal opinion sent to him on June 7<sup>th</sup>. I will now read a memo that Mr. Chaet sent me following his conversation with Mr. McRae. By the way our lawyers spent 12 hours interviewing our brewers and understanding how they interact with the rest of the managers in the restaurant, whereas Mr. McRae total time expenditure was about an hour. The memo from Barry Chaet to myself on the Wage and Hour Audit: "On today's date I spoke with Randall E. McRae from the Department of Labor. He stated he has not changed his mind since he received my letter dated June 7, 2001. He still feels the brewers are not exempt. It is clear from our conversation that he is focusing only on the manual aspects of the brew making and not the other job tasks. When I asked him how he could ignore all the other job duties the employees were performing, he basically discounted their importance. He did not present me with any arguments to substantiate his position other than stating his 30 years of experience. Indeed, he ignored my arguments, and it appeared to me that he simply did not want to listen to them. He was sticking to his prior investigation and determination that he made then. He threatened to cite the company with "substantial civil penalties" which he threatened me prior to me hiring our lawyer. This is the second time he has done so. The first time when we met on June 4, 2001 prior to his legal opinion being sent to Mr. McRae. He tried to go back three years to claim compensation. The clear inference is that if the company does not capitulate with his demands it will have to face the full wrath and power of the United States government. I responded that there is no basis for willful finding, much less any adverse finding at all. He then asked for the address and phone number of Bill Stevenson, one of my former brewers, so that he could talk to Bill about his role as a brewer too, see, but it correlated to my two

brewers currently on staff. And that was the memo from Mr. McRae. To date, I have not received any written correspondence from Mr. McRae as to the status of our case. He phoned me in August and we have a conference call with our attorney. The purpose of the call was to inform us that his office was not going to pursue the case because they felt that they couldn't prevail because the brewers would be hostile witnesses, which didn't make a lot of sense to myself or my lawyers. The brewers are very happy with their position, therefore why would we expect them to be anything but in agreement with what we are doing as a company. So, that was the reason he gave for them not pursuing their case. Let me point out that brewers are very content with the way their compensation is structured. I pay my brewers in the top 20% of the salary range for brewpubs in the United States. However Mr. McRae feels we are in violation of the United States Labor Wage Laws and that he will put in our file his opinion that we are not in compliance with Labor Laws and he calls it Willful Non-Compliance. I asked for and have not received a letter to that effect and this conversation took place around August 16, 2001. On a positive note, we did receive a call from Ms. Salano, Assistant Director of the Department of Labor Wage and Hour Division in Chicago who wanted to visit our brewpub to meet with our brewer before she made a ruling on the case. She spent approximately 4 hours on October 5<sup>th</sup> at our business reviewing work done by our brewer and discussing the facts with Mr. Chaet and me. I received a call from Mr. Chaet on November 20<sup>th</sup> saying that Ms. Salano told him that our brewers would be exempt per our request. I have not received this is writing from Ms. Salano. I do understand a letter is on its way to me to that effect, but I did get a letter from Mr. Chaet addressing the fact that we did receive the exemption for our brewers as Administrative Exemption. So for that part I am extremely happy. I would like to state that at no time with any talks with Mr. McRae was I informed of my right to contact the Ombudsman Office. I was told that through my Congressman, to ask for assistance. The only thing I was informed of was that this investigation was public record and could be accessed by the press and could show up in the newspapers. This again showed me that the investigator had a specific mindset in that a veiled threat that this might show up in local newspapers, that I am being investigated by U.S. Department of Labor Wage and Hour Division and was going to keep me from standing firm on my position. To me it appeared to be a designed attack by Mr. McRae to use the weight of the government to intimidate me. If I didn't capitulate he would bring the full power of the government down upon me. In closing, I would like to go on record, and first of all I do understand that my case in terms of monetary, I know that several of you have been going through this for years, and my heart goes out to you, but I do feel that my small case is a symptom of things that need to be changed within the government regulatory agency. In closing, I would like to go on record that I am upset and frustrated at the actions of a government agency and at least one of their employees. I would also like to state that Libertyville Brewing Company has no interest in becoming a test case for the Labor Department. We have already spent thousands of dollars just getting to this point and we don't have the funds

to take this to the Supreme Court. I don't think the local U.S. Department Labor Office cares whether they win this issue or not, and I am sure that many businesses just comply with an investigator's decision because they don't have the understanding, money or time to argue it. However, we do feel we have been wronged and we are asking that someone of a reasonable mind review our case and update the department's regulations so that current business conditions can be properly addressed. I would also like to make a point that deters others from contesting wrong decisions by some governmental field investigators. This point is that we as business owners have no course to file for reimbursement for the legal costs to contest any alleged violations. This possibly would not have been necessary if Mr. McRae had listened and used his agencies resources and/or advised us of our SBREFA rights to see how we fit into an exempt situation. Based on Mr. McRae's threatening approach, threatening me with civil penalties, thousands and thousands of dollars, public record, etc., I felt that I had no choice but to hire a Labor Law attorney, and as you know, they are very expensive. In such a situation why is there no recourse for us to be reimbursed the \$7000 plus that we spent so far? Why isn't the Department of Labor Wage and Hour Division or any division accountable for the actions of one of its employees, as I would be if one of my employees were acting in the same manner as Mr. McRae? That means that even though we win our point and are able to structure our business to meet our needs, we are still out those dollars spent protecting our rights. That does not seem to be in the spirit of a government for the people. If the members of this hearing or anyone else in Washington D.C. need any further information with my testimony or the address of my lawyer in Milwaukee; and I also have his copies of his legal opinion. I do have copies of my brewers' affidavits describing their job functions, which do again meet the criteria for exempt status. That is my testimony.

**Michael Barrera:** Do we have any comment for him?

**Lyle Clemenson:** Mr. Sugars was there a complaint against your business for practicing or was there a complaint from one of your employees?

**William A. Sugars:** No. He told me, of course, he said I don't have to have a reason to be here. I am here, this is four years after the previous visit where we actually ran into the same situation at which time, I paid my brewer I think \$1000 because it wasn't worth my time to fight this issue, but at that time I still objected and said that I don't agree with the Wage and Hour classification of my brewer as Non-Exempt Employee.

**Lyle Clemenson:** So, I'm trying to understand, did they just come to your place as a matter of course?

**William A. Sugars:** That is what he said.

**Lyle Clemenson:** Thank you.

**Michael Barrera:** Any comments?

**Tom Hicks:** I want to address a couple of issues that Mr. Sugars talked about. I work with small business programs within the Department of Labor's enforcement agency. My boss is the liaison between the Federal Enforcement Agency within the Department of Labor and Michael Barrera's office of Ombudsman of the SBA. There are a couple of issues here of regulatory fairness and there is no excuse for that, everyone should be treated fairly. One of the responsibilities the Wage and Hour investigator has when he is doing an investigation to offer you at that time...the Wage and Hour is one of the few agencies that has printed information in their pamphlet for Unfair Labor Standards Act that should have been offered to you at that time. Michael mentioned one of the things we are working on is the Unfair Labor card which would be required to give small businessman when they conduct an investigation. With regard to reimbursement of legal fees, I am not sure if you would qualify under Equal Access of Justice Act...there was an amendment under SBREFA to the Act. You might want to consider that and have some contact with an attorney. There is Amendment to the Equal Access to Justice Act that would allow you to be reimbursed legally, if you qualify under that statute. The Equal Access to Justice Act.

**William A. Sugars:** I will get that from you afterward. Thank you very much. That is basically it, because I honestly feel if he had given me the information to contact Ombudsman office, SBREFA rights, etc. I would then have had the ability to make a decision myself whether I wanted to hire a lawyer or not. When they threaten me with civil penalties and thousands and thousands of dollars; and basically I am not on a crusade against Mr. McRae. He, in my opinion is a bad investigator. He is not an asset to your department. The main problem is that I don't think he is alone in this country. These people need to be brought up to speed. They need to be taught how to treat people. They need to have an open mind and think outside the box. My business did not exist when his manual was written and that is what needs to be updated.

**Tom Hicks:** One other issue of the exemption status...and I don't want to get into that, congress has to take a look at that amendment and make changes in terms of exempted and non-exempt employees. If we get a hundred calls per week in our office 60% of regarding whether an employee are exempted. That is definitely an issue that has to be addressed. Thank you very much.

**Michael Barrera:** Next we call on J.D. Gaylor, Associated Builders and Contractors of Indiana.

**J.R. Gaylor:** Thank you very much for this opportunity. My name is J.R. Gaylor. That is all right. My writing is probably not very good. J.R. Gaylor, Executive Director with Associated Builders and Contractors of Indiana. We are a not-for-profit organization representing merit shop

contractors in this state and in the country. I represent about five hundred small business construction owners here in Indiana. I will be brief. We have two issues that are complex but I will try to sum them up in a brief manner for you, and again thanks for the opportunity to hear this. The first issue that we would like to bring forth as a real concern and something that is damaging our small businesses here is really the manipulative abuse of Title 7 of the National Labor Relations Laws. In this area particularly there is a tactic used by the Union Building Trades, and we do support their right to organize workers, but when in fact those efforts within companies cannot take place or the workers decide not to be organized, then the actions of the local organizers go beyond their right to organize. What typically happens is...it seems like in this district there is a tendency for every frivolous charge to be filed with the National Labor Relations Board, and we feel that the National Labor Relations Board in this Federal District is being compliant with this intimidation tactic. To give you a couple of examples of that, we had a Congressional Hearing here in Indianapolis in 1999 on this very issue of the intimidation by the National Labor Relations Board in this district and in that hearing we found that 50% of all the frivolous salting charges have been filed in this area. We think that is an indication that the district of the NLRB in this area is being compliant with this tactic of intimidation against small businesses. We have one local contractor that his record with the NLRB is 96 and 0. You might look at that and say well is that an incompetent business owner that has had 96 charges against them? Well we look at it the other way. He is 96 and 0. He has won every charge. What that is telling us is that if not all of those were frivolous charges that they have had to defend themselves against. It does not cost a salt or an organizer one dime to file a lawsuit. For every frivolous lawsuit charged it costs our small businesses \$10,000 to \$20,000 to defend themselves against each charge. I have one of my contractors with me today and he has three current suits of those similar thoughts, and I will share those with you for your consideration. It is the same kind of tactics. Again let me reiterate, we are not disputing the unions right to organize workers, but what happens is it goes beyond that where the salts cause havoc. Their ultimate goal is to run small business out of business by having them respond to frivolous lawsuits and again our concern is the National Labor Relations Board in this district is being particularly compliant with those frivolous lawsuits and they are taking them on and just causing our small business owners to have to defend themselves against these frivolous charges. I would like to pause there on that first issue and respond to any questions or comments the committee might have before I go on to the second issue.

**Question:** I have a question, can you define the term salt?

**J.R. Gaylor:** Yes, the technical term and the protected term is organizers, but the kind of code word that is used in the industry is called a salt and that is where a union trained organizer that goes into a company to organize the workers. In fact they salt the company. Again

where we think the line should be drawn and protection for small business is, is if that salt is unable to organize the workers, then their goal is to cause havoc within the company. To file the charges. Another example is that we had a salt within a company that built a handrail to a job site trailer 3" lower than the standard and then they called OSHA to come in and fine the company. So their goal is once they cannot organize the company workers, then they take tactics to cause havoc and cost the small business owner money. Our concern is again, that the salt is really an employee of the union, or an employee of someone else to come in and cause havoc in the companies. We have offered legislation, and it has passed the House of Representatives twice called Truth in Employment Act and that Act basically says that if you apply and want to work for a company that should be your intention to work for that company in gainful employment, not to be an agent of another organization to try to come in and disrupt the operations of a company. It is simply called Truth in Employment. We think that is very logical and fair that if you want to work for a company that should be your sole intention rather than come into a company to try to destroy it and that is the code word for that process.

**Question:** What is the average size of your organization, the members of your organization?

**J. R. Gaylor:** Well, in Indiana 80% of construction companies have 10 or fewer employees, so that is typical construction size company in this state.

**Question:** So it is the objective of the unions or the manpower to use the strong arm of the government and government money to try and ....

**J. R. Gaylor:** Absolutely, and they are using the NLRB and we think that in this case since 50% of all of these frivolous charges have come out of this district that the NLRB in this area is being compliant with that ulterior motive by the union. Again it does not cost the salt one dime to file the frivolous charge but it cost the small business owner every time that happens and as I mentioned we have some examples of large numbers of these frivolous cases being charged. It takes quite a bit of money and I know for companies it is not unusual for the company to include within their budget \$100,000 a year just to defend themselves against these kinds of frivolous charges because they know that is what is going to happen.

**Question:** Have you notified the NLRB about any of these issues?

**J.R. Gaylor:** We have continually tried to bring this up to their attention, and as I said there was even a congressional hearing on this in 1999 and we just have not had any success with that.

**NLRB woman:** I work in the local office of the NLRB. I would like to respond with regard to frivolous charges, once the charge is filed, we have an obligation to investigate them. We do not initiate charges.

Outsiders come to us to initiate charges and then we have to investigate. I understand the concerns of the small business owners in regard to the cost of hiring attorneys to address the charges, but when the charge is filed we have an obligation to investigate. Thank you.

**J. R. Gaylor:** If I can respond to that? We do understand that process. I guess our concern is the process is being manipulated and we are looking for ways to try to reach some fairness. Part of the legislation being offered in Truth of Employment is that maybe if there is a frivolous charge and the employer is found to be innocent then maybe the charges that they have obtained to attorney fees would go back to someone else, either the salt that filed them or the union behind that or the NLRB themselves; and maybe that would discourage some of the frivolous charges, because I understand your situation. You do have to investigate them and try to sort them out, but the amount of frivolous charges if there was some kind of recourse then that the object that the small business owner had to go back on and they were found innocent of these charges, then someone else should be responsible for the cost incurred. That might discourage the manipulation of the process.

**Lyle Clemenson:** Do you feel you have recourse at this point in time?

**J. R. Gaylor:** We really don't, and again I am thankful for this opportunity. We tried many times through our federal office and locally to deal with the National Labor Relations Boards. As I said we have tried to get legislation through congress and the House has passed that a couple of times, but that has stalled so we are just looking for another opportunity and have to get the story out and the concern out.

**Lyle Clemenson:** Is NLRB trying to meet with you? I didn't get that from your conversation.

**J. R. Gaylor:** Our organization both nationally and locally have yes tried to do that. I can't document the process of one of those meetings. I would say in the last couple of years it has broken down though. There is not much communication there and that is what kind of provoked the congressional hearing led by Senator Hutchinson here in 1999 because no doubt those talks had broken down.

**Lyle Clemenson:** Madam from the NLRB, is that pretty common? Can you comment a little more of what have tried to smooth over the differences between what is going on here and what hasn't been going on.

**NRLB woman:** I am not aware of the indications the gentleman refers to so I'm not sure what is happening on that. I have not been involved in any communications between this association and my office. I am sorry I am not aware of the status of that process.

**J. R. Gaylor:** The second one is a little preempted by the actions of the Justice Department, in fact just a couple of days ago my second issue is on February 17 in the first 100 days of President Bush's presidency he issued an executive order that all construction projects, or all federally assisted construction projects be open to competition for all contractors to bid on. That executive order was challenged and suit filed by the AFL-CIO in April, a district judge ruled in their favor halting the executive order and my request to this board was to encourage the United States Justice Department to appeal that. They did two days ago. So that is on track. I guess from a small business view point we believe that all federal work should be open and free to competitive bidding and when there are what we call project labor agreements put on federal projects that essentially lock small businesses out from participating in construction projects on a federal level. So my plea today since the U.S. Justice Department did take action is just to report that we support that action and from a small business perspective I would ask that you would continue that the Justice Department to encourage that appeal process.

**Bill Ivers:** My name is Bill Ivers. I am with the law firm of Stewart and Irwin. I represent the Automobile Dealers Association of Indiana, the Indianapolis Auto Trade Association and also the Indiana Independent Auto Dealers Association, the used car dealers as well. What I am here to talk about today is a fairly narrow issue. Unfortunately it does not involve any of the agencies that are present here today. I involved both the FDC and Federal Reserve Board and involves the regulations that have been implemented for the Truth In Lending Act. As most of you may or may not know, the Truth in Lending Act is the federal statute that provides for provision of disclosures to consumers concerning loans, finance agreements that are used in consumer transactions. This statute specifically impacts the Auto Dealers Association so I felt it was necessary that I talk to you about it today. Specifically, what I am here to talk about is the implementing regulation which is known as Regulation Z which provides for the mechanism, the form and timing that the disclosures have to be made in to consumers and the problem that the automobile dealers are having is that this regulation is not clear and as a result we have decisions in the courts right now which go both ways. Let me just describe to you what the scenario is. Customer comes to a dealership to buy a car. They decide that they want to finance. The dealership provides them with information concerning the available rates. Right now everybody knows that you can get 0% interest. The way it is typically done is that you would have the dealer prepare a lending agreement, the retail installment contract which all of the figures and interest rate and overall finance charge are disclosed to the customer in writing. If you have ever bought a car you know that you are in the finance manager's office at that time. He will put the document in front of you and say here is the car you are buying, this is the interest rate, this is price, this is your monthly payment. Typically then if the customer is happy with that transaction he asks the customer to sign that document. After the customer has signed the document the finance manager takes it tears off the customer's copy and

gives it to the customer. There is a decision on the 4<sup>th</sup> Circuit Court of Appeals which provides that that transaction does not comply with the regulation. The regulation says you have to provide a copy in writing in a form the consumer may keep prior to the consummation of the transaction. If you look at the Truth in Lending Act, it says before the financing is approved and everybody is bound on the document. At the time the consumer signs off on the document the dealer has not signed off on it yet, so if the finance manager tears off the contract and gives that contract to the customer at that point, he has provided him the document before the financing has actually been completed. 4<sup>th</sup> Circuit says no. It is as soon as the customer signs off on that document. Recently we had an Indiana District Court hold 4<sup>th</sup> Circuit you are right. Illinois District Court said 4<sup>th</sup> circuit you are wrong. We then went back to the Indiana Court and the Indiana Court said you are right, 4<sup>th</sup> Circuit is wrong. So currently in Indiana our district courts are not following that 4<sup>th</sup> Circuit Court of Appeals decision. We don't have a division yet from the 7<sup>th</sup> Circuit. All of these conflicts can be avoided. All of these conflicting decisions can be resolved if the ATC and the Federal Reserve Board go back to Regulation Z and specifically identify when the actual form has to be handed to the consumer. Is it when the consumer signs, is it before the dealer signs off on the contract, is it before the finance company approves the retail installment contract? If you look at the statute, that is what I believe congress intended, who is before the financing is finally concluded you get a copy of what it is you are actually buying. What the terms of your finance contract are going to be. In Indiana we currently gave district courts which are saying that is exactly what needs to be done but until the regulation is amended to address the conflicting interpretation which has been created by the 4<sup>th</sup> Circuit you are going to have this uneasiness for dealers because theoretically on every transaction they enter into with a consumer they can be held liable by under the Truth In Lending Act in Regulation Z because of the conflicting definition that has been given to our private courts. So, I guess what I am here asking SBA to do is to talk to the Federal Reserve Board and FDC and see if we can do something to amend that regulation so that it is clearer. The dealerships are not out there trying to violate the statute, they want to comply with it. They want to comply with the regulations, but when they are then faced the regulation that one court is saying is A and another court is saying Z what are they suppose to do? Again I appreciate the time and opportunity to talk with you today and if you have any questions I would happy to address them.

**Michael Barrera:** If you wouldn't mind this is going to be on the website and we can download the form they have on there so we will have a record of it, and if you could get some written testimony with your name and all than we can see to it.

**Bill Ivers:** Okay thanks.

**Lyle Clemenson:**What is the dealer's penalty?

**Bill Ivers:** The dealers penalty is potentially \$1000 per transaction, two times the finance charge which right now the finance charge is 0% so two times 0% is 0%, and if a crafty consumer attorney can create a class action, he can be liable for up to a half million dollars.

**Maria Tapia:** First of all thank you for the opportunity. I represent Hispanic Hoosiers which is a small business which has been in existence for three years and thanks to the support of the SBA who has been working along with us the past three years, we have done the Latino Business Expo, and this year we had a total success of 6500 applicants that came looking for a job. We are grateful and I think this next year we are going to bring on SCORE with us and the SBDC Center too here in Indianapolis to work with us. My presentation is probably going to be totally different than the others. About eight years ago I was participating in a national Catholic pastoral plan. Imagine yourself having Hispanics from California, Florida, New York and the Midwest coming together in the Cathedral in Washington to put together a National Pastoral Plan. I thought to myself that would never happen, we can't even our communities to come together, nevertheless on a national basis. But the spirit of GOD was working, and we did come together and there were 7 areas of needs to identify being a Catholic Pastoral Plan. The number one need of the community identified was evangelization. The Hispanic people nationwide were hungry for the word of GOD. The number two, an evangelization on a local level we deem also a Pastoral Plan. From 1976 to probably 1995 I worked as a volunteer for the archdiocese of Indianapolis promoting the plan locally. Another need that was identified was education. We worked on that helping Sister Mary Kaye on establishing the Hispanic Education Center. We used to call it the Holistic Education Center because we wanted Hispanics to teach other Hispanics on the things that need to be done but it is now called and functioning very well the Hispanic Education Center. On the jobs that was the third priority that was identified and I think this year we addressed that through the Latino business expo. The fourth area was communications. The fifth area youth housing and migrant services. So we are on the fourth one on communications. In 1996 I visited with several radio stations wanting to buy some time for a radio program and there was only one station that opened the door. They didn't think that Hispanics lived in Indianapolis. Imagine yourselves living in a Spanish speaking country and everything you hear is in Spanish and you are monolingual, you only speak English. We started a program on Sundays from 6:00 a.m. to 2:00 p.m. It was a total success. The manager saw the success that he turned, the owner had an AM and FM station, so both stations became Spanish speaking programs and are now still are doing 7 days a week 24 hours a day on the FM and the other is only morning until night. He being a good entrepreneur he saw the opportunity. He took over all the programming himself and decided what to put on. It's America, you can do what you want. Then we ventured into TV and said with all the Hispanic community the way it is growing we need to bring to this English speaking community visual images of the caliber or people we have here in Indianapolis and we started Indianapolis Habla Español and brought some of

our business community, some of our leaders community and some of the non-Spanish community. We had the IRS talking about how to file your taxes because many of our people were being ripped off, being charged \$400 and \$500 to file their taxes, so we had a lot of government agencies doing that. The mind of the time, it is not difficult now but what we need is our own local radio and TV station. Right now we are like renting an apartment and at the owners wish we can be evicted at any time if he so chooses. I have done a lot of research, since 1998 the commissioner Gloria Trestani, this is in 1998, she says that 99% of the Hispanic community in our homes watch TV and more than 90% of Hispanic watch TV and over 64% watch TV more than 4 hours a day. The impact is great. Then she says that when it comes to broadcasting business, one of the keys is who actually owns the station and therefore ultimately controls the additional content. The numbers in this area are disturbing she says. In 1996 minorities only owned 3.1% of the broadcast properties in the US. That number now has dropped even lower to 2.9% and among Hispanics the figures are even worse. One half of one percent of the full-powered TV stations and just over 1% of the radio stations are Hispanic owned. We need to look at access to capital. We need to look at education and training and we need to look at how to do it. I have spoken, this is like a broken record with Jan and she keeps telling me, Maria we are going to have a radio station. It is not a matter of whether we are going to have it, it is when we are going to have it. As far as communicating with the FCC we have been unsuccessful. I have corresponded, Senator Bayh wrote letters, Senator Lugar wrote letters and all I get is just packages of information. I have researched the WEB getting information and even though we have the beautiful words of this commissioner giving us the statistics we have not been able to connect with them as we have done with the SBA. So today I am just here to ask you for help to see if they would listen, if there is a warm body behind that entity that can talk to us and explore the possibility of having here in Indianapolis our own local TV station whereas we won't have to pay 10 and 20 million dollars for it. I thank you.

**Michael Barrera:** Bill Pierce.

**Bill Pierce:** My name is Bill Pierce. I too would like to thank SBREFA for allowing me to join the panel, join the hearings on such quick notice since I just heard about this meeting on Saturday of this past week. My case refers and goes back to the Department of Labor. As the gentleman with the beer pub talks about the intimidation that government workers like to bring forth. I am a victim of it. Let me briefly run through of the case. I am William J. Pierce, PE the sole owner of Pierce Processing, Inc. an engineering consulting firm which opened its doors in 1983, headquartered in Cincinnati, Ohio. Within five years it was a multi-million dollar organization with branch offices in Louisville, Kentucky and Detroit, Michigan. Our clientele base was consumer products and chemical manufacturing companies. At its peak the company had nearly 30 professional employees including multidiscipline engineers and designers and also employed a number of contract employees from temporary agencies.

The company did not provide technical services to the federal government or any public entity. In June of 1998 a compliance officer from the Department of Labor Wage and Hour Division performed a "spot audit" of the business in the Cincinnati office which included an analysis of all employee payroll, billings and receivable reports. In addition he requested and received the opportunity to interview a number of employees behind closed doors. Based on the audit the Secretary of Labor filed a federal lawsuit against the company and William J. Pierce, PE on January 9, 1989 alleging seven times a willful and purposeful violation of the Fair Labor Standards Act. The lawsuit involved the Department of Labor's new interpretation of four words within a 32,000 word regulation that was written in 1942 covering the salary test for salary exempt professional employees. In spite of numerous requests in 1988 and as recently as the fall of 2000, I have repeatedly asked the Department of Labor to show me one piece of case law, show me one interpretive bulletin, show me one letter of opinion, show me anything that could be said to have placed me on notice in 1986. The most recent response was, we have talked about this case for 10 years, there is simply nothing more to say. I even gave them a challenge, you show me any of those documents and I will walk into the sunset and forget this case right now. The response came back, we have talked about this case for 10 years, there is simply nothing more to say. According to the documents filed by the Department of Labor trial attorney, the case involved the flextime policy that Pierce had for its employees. The policy allowed the individual employee to decide when he or she would work the 80 hours commensurate with their salary. The offices were open 12 hours a day. We paid on a two-week pay period. That is 120 hours. Since my employees were managing multimillion-dollar contracts for me and my clients, I assumed they could manage themselves. Since the office was open 120 hours in a two-week pay period the employees chose when they were going to work hours. They did not have to ask permission to leave early, they did not have to ask permission to leave late. The policy allowed the employee to determine when the missed hours would be made up, charged to their paid time off account, or take a deduction. The decision was solely that of the employees. The complaint stated that Pierce had willfully and purposely violated the Fair Labor Standards Act, and more specifically the salary basis test governing salary exempt employees. During the course of the litigation the attorney for the Secretary acknowledged that the employees covered by the case qualified as salary exempt employees based on their job descriptions, backgrounds and experiences. They also acknowledged that the time in question was time only when the employees left work on their own accord to pursue personal and family matters or, and more importantly, fishing, golf and flying model airplanes. The case against me involved 105 hours out of 70,000 hours of work during the audited period. In monetary terms it was \$3,100 out of a 1.5 million-dollar payroll. Folks, that is 2/10th's of 1%. During the three years leading up to the trial the Secretary's trial attorney refused to remove the willful and purposeful violation claim. As the gentleman was saying, pure intimidation. The court ordered pre-trial hearings, the court ordered

mediation hearings, and each and every time the government's attorney refused to withdraw the willful and purposeful violation claim. Willful and purposeful violations claim brings and allows the Department of Labor to charge what they call liquidated damages, which doubles the monies involved in the case, and adds an equal amount to the liquidated damages to the monies sought in additional penalties. That brought my case from \$3,100 up to \$50,000. At the same time they were demanding \$50,000, they could not produce any documentation to support their new interpretation. As I said, no letter of opinion, no interpretive bulletin, no defining regulation and no case law. Also during that time they refused my three offers to pay the disputed \$3,100 and to promise to comply in the future, and that was in accordance to the Department of Labor's own regulations in a phrase called the Window of Correction. At the trial the Secretary's attorney and Compliance Officer withdrew the alleged willful and purposeful violation claim. The judge walked into the courtroom, we all introduced ourselves and before opening statements the government's attorney stood up and said, "Your Honor we made a willful and purposeful violation claim, we are withdrawing that claim." So in a heartbeat the issue that we could not get over in 3 ½ years was wiped off the table. Not only did they acknowledge it was not a willful and purposeful violation claim, they also acknowledged that I had overpaid the same employees during the same timeframe a total of \$42,509.78, more than 13 times the amount they said I wrongfully deducted. The wage and hour division of the Department of Labor violated their own regulations by not allowing me to resolve the issue in a timely fashion through their own Window of Correction, which is written within their own regulations in the salary basis test. Furthermore the lawsuit violated the Portal to Portal Act which protects employers from liability for activities which are preliminary to or postliminary to the employee's principal activities defined as the functions the employee was hired to perform. Clearly golf, fishing and flying model airplanes do not fall into the category of principal activities. The act also prohibits the punishment and liability of an employer who is operating in good faith of the regulations. As far as good faith is concerned, let me read to you very shortly the findings of the court. The Magistrate Judge ruled, "Here it is clear the defendant Piece's deductions were never made because work was lacking but only when the employee was voluntarily absent for personal reasons unrelated to whether work was available. All other aspects of this case point to a situation where the employer intended to pay his employee on a salary basis, intended to operate within the spirit and letter of the act and sought to treat and pay his employees in a manner that was professional, considerate and equitable." What was the effect of all this? The 3 ½ years of legal maneuvering leading up to the trial took enormous toll on my business, both in legal expense but even bigger expense was taking my time away from the business. As most of you, or all of you who have owned and run a small business one of our big and primary hats is business development. When suddenly we have to take off the business development hat and put on the hat of self-preservation all things change. As a result, the business collapsed in 1992 and the last employee was laid

off in 1993. My business and personal financial credit have been destroyed along with the foreclosure of my Cincinnati office building and my family residence. In addition I lost the business and the ability to draw an income in the profession of engineering which I was trained. Also, two U.S. patents that I had developed over time were lost because I could not long afford the maintenance fees to keep them going. With credit destroyed, and the loss of the families residence, Pierce's application, my application to several apartment complexes were turned down because my credit was so poor. At 41 years of age I had to move my children and my wife into my Mommy's home, and have lived for the last 8 years in the unfinished basement of her house. That is where my children have called home. Because I afforded my employees flextime to the tune of \$3,100 out of a 1.5 million dollar payroll. The last 7 years that is where we have lived. When we were forced to move from our home all of our furnishings in our large home had to be sold in a garage sale because we had no place to store them. All the 401K plans which had been set aside were lost, along with the money set aside previously for the children's college education. I have lost the ability to have my name on a banking account. I have been prevented from signing checks for the last 8 years. I am not allowed to own a ATM card. Why? Because with the collapse of any multimillion dollar business there are tax ramifications as you can well imagine. In 1993, with the foreclosure and sell of my home, I paid 90% of the tax liability. The IRS wanted the remaining 10%. Between IRS and business creditors twice my bank account was raided until I got smart enough to take my name off the account, and for the last 8 years I have funneled all my paychecks into my wife's account so for 8 years I have not signed a check. I have to ask my wife for a signed check or borrow her ATM credit card. Now interestingly enough the Internal Revenue Service is placing even more demands that they want their 10%. That 10% is roughly around \$16,000, but when you add the penalties and interest to it we are up to about \$67,000 which is what they are demanding. Their demands now that we lost our home, our automobiles have 138,000 to 198,000 miles on them, they are no use to them. Their claim is that they are going to attach my paycheck. I am now currently and have for the last 6 years a teacher of the next generation of Americans in high school. Every day I stand in front of my class and every day my wife stands in front of her class and we repeat the Pledge of Allegiance with our classes. Every day we end with the fact that this is one nation, under GOD with liberty and justice for all. I still believe we will see justice, the only question is how long. The IRS is now making claims we are going to take your paycheck. In a defensive mode, because they are now targeting my wife's account, we are now depositing not only my paycheck but her paycheck in a neighbor's checking account, so now we have to go to a neighbor to get some pre-signed checks. Should any American have to live this way? This is outrageous. Yet over \$150,000 in business and government judgments still exist and collections are currently being pursued. We are still getting telephone calls, and by the way, business creditors do not leave the weekends off. We receive calls as early as 7:30, 8:00 on Saturday morning and as late as 8:30 on Sunday night. I made an

offer of compromise to the IRS which would have allowed them recapture of the remaining tax liability, and it would also have allowed me to start rebuilding my financial position. That offering compromise was refused because they want not only the remaining tax liability they want the additional penalties and interest. Their demand for the penalty and interest will prevent me from allowing my children to attend college; because that is what we are down to. It is an if/or situation. My children attend college or the IRS gets their needs met; and at the risk of sounding arrogant and I am going to look to you Mr. Crawford because you are representing them, and I know you have nothing to do with this; at the risk of sounding arrogant my children are not going to lose the opportunity of college education. A second generation of my family is not going to be destroyed because I afforded my employees' flextime; because that is what we are all talking about. The same flextime that both Presidential candidates ran all over the country, not this last time but the time before in 1996. Both Mr. Clinton and Mr. Dole ran all over the country saying because of the mushrooming economy, because of double income families, and because of single parent families we have the need to change the rules to allow flextime. Well, they sure changed. The IRS action as I said will cause my children to lose the opportunity to attend college and be denied the ability to pursue a professional career. Why should a second generation be penalized a lifetime for their father's giving his group of employees the freedom to chose their working hours in concert with corporate flexible time? The family has endured 13 years of hell on account of a \$3,100 dispute while the government acknowledged \$42,509 in excessive of overtime payments. I would also like to point out, because I know my time is ending shortly, in the Department of Labors own regulations, and I quote "Were deduction not permitted in these interpretations was inadvertent or made for reasons other than lack of work, the exemption will not be considered to be lost if the employer reimburses the employee for such deductions and promises to comply in the future." That is what I offered to do three times and on three times the Department of Labor refused to reconcile the case by that. Also in the Department of Labor's own Fair Labor Standards Act, the Portal to Portal Act says, "No employer shall be subject to any liability or punishment under the fair labor standards act on the account of the employer to pay overtime compensations for on account of any of the following activities for which the employee engaged in" and it says "Activities which are preliminary to or postliminary to their said principle activity or activities which occur either prior to the time when a particular workday which the employee commences or subsequent to the time in which the employee ceases to perform their activities." A couple of comments and then I am finished, okay? A couple of things I need to point out to the SBREFA organization. At the same time I was being sued, and I have demonstrated in court that I am the first business in America sued under this interpretation and under this portion of the regulation dealing with the regulation which was written in 1942, at the same time I was sued by the Department of Labor, the Department of Labor had the exact same flextime policy for their employees

that I had for mine. Furthermore, during the exact same time the Department of Labor was writing brand new regulations exempting all public sector employers from this salary basis test issue and as stated in the Federal Register repeatedly, we are giving this exemption retroactive exemption and blanket retroactive exemption to government agencies because if we fail to do so the resulting lawsuits will bring about financial ruin to them. It stands to reason that if it will bring financial ruin to a government agency that merely needs to raise taxes or run at a budget deficit, it would certainly destroy a small business. As I said earlier, every day my wife and I say the Pledge of Allegiance and I really do trust and believe that liberty and justice will someday occur. Thank you.

**Lyle Clemenson:** The question is the amount of money the IRS is requesting, how did it get to be so much from the \$3,100...

**Bill Pierce:** No, the \$3,100 was the Department of Labor. The IRS are taxes due as a result of the collapse of the multimillion organization, multimillion dollar business, so those are two different...You bring up an interesting point, the Department of Labor has had an official and formal judgment against me since December of 1998. they have not taken one step to pursue that since their judgment.

**Lyle Clemenson:** The money itself, the amount of dollars, how did it come to be so great? Was that from withholding taxes?

**Bill Pierce:** Yes it was. In 1991 during the Gulf War and recession that took place somewhere around that time, I made the error in judgment of withholding that so I could keep my employees, the vast majority which were over the age of 50 on the staff. I can also demonstrate that during that time I personally did not take a penny of compensation, so it wasn't in order to support me. It was an error on my judgment. The Department of Labor made an error in their judgment in 1988. They apparently can turn and walk away from it. I have lived 14 years of hell and if the IRS says they are going to recoup that, and they have told me it will take 7 to 10 years to recoup it, that will be a 24 year sentence that I will live, my wife will live and our children will live as a result of flexitime.

**Lyle Clemenson:** What would be the base amount without the penalties and interest?

**Bill Pierce:** The original base amount was somewhere around \$117,000 or \$118,000. \$100,000 of it was paid in 1993. Now, including penalties and interest they are demanding in the vicinity of \$67,000.

**Lyle Clemenson:** So without penalties and interest what would it be?

**Bill Pierce:** \$16,000.

**Lyle Clemenson:** And you are saying they will not settle.

Bill Pierce: I offered to compromise and was turned down. I will say one thing to you sir, and I understand you are from Ms. Robinson's office. She is a wonderful woman. She is the first person in any government agency who was willing to sit down and listen to what I had to say for which I am still indebted to her. She awarded me 4 ½ hours and I thank her for it, if you will pass that on.

**Michael Barrera:** Mr. Pierce thank you.

**Lyle Clemenson:** Cal Thompson of Prairie Land Management from Glenwood, Minnesota was unable to come to our meeting and so he wrote me a letter, but I am going to just take excerpts from his letter rather than read the whole thing. Basically, what he is talking about is that he went into business as a small businessman after working for governmental agencies and seeding wild grasses on government grass areas where farmers need to maintain their land, I guess would be the best way to say it. Anyway briefly, in the year 2000 he had a gross income of \$1.4 million of which \$500,000 was locally in Glenwood, central Minnesota, a small town area. In the year 2001 due to the impact that the local government office of the Soil and Water Conservation District has had on the business, they were severely low in their annual contribution. The company provides about 1,500 acres of product and service in Glenwood. Since the local SWCD developed services providing native grass seeding services and seed, Mr. Thompson's company had only 29 acres to provide products and services to in 2001. On the other hand, Mr. Thompson has verified that the local Soil and Water Conservation District had over 1,500 acres to provide product and service to. The local SWCD has taken all but a few acres of the seeding business in the community. Not only are they taking business away from private small businesses, they are providing it at the expense of taxpayers. Our tax dollars are funding organizations that directly compete with the private businesses. Most of the conservation programs, CRP, WRP, CREP, etc., that require seeding, trees and planting also provide federal cost share dollars. This cost share varies from 50% to 100% depending on the specific program enrolled. Products provided by the local Soil and Water Conservation District, non-profit or other governmental agencies in turn receive these federal cost share reimbursements. Most SWCD's offer tree sales that reflect a 100% to 140% markup on their product, which receives federal cost share reimbursement for the product. On numerous occasion Mr. Thompson has lost business due to competition from the United States Fish and Wildlife Service. The Fish and Wildlife Service is involved in a program where they offer free use of native grass drills. We have observed federal employees delivering these native grass drills to private landowners using federal vehicles to transport the drills on federal time. It seems to be a very poor use of federal funds when the private sector already provides planting and seed services. It also appears to be high risk and high liability. PLM has approached numerous people at USFW, and asked them to discontinue free use of the government drills as it unfairly competes with private business and takes away economic development. We were denied. USFW have also on several occasions' donated used equipment

to the local Soil and Conservation District for their use, and to offer to private landowners. This also seems to be a waste of federal funds and directly contributes to unfair competitions from the SWCD. United States Fish and Wildlife also provided native grass seed to private landowners at no cost. The seed is usually harvested and cleaned with federal equipment, federal staff and on federal time. This is in direct competition with seed grower, seed cleaners, and seed dealers. It is usually harvested from Federal and State lands which contributes to the potential saturation of a market and lowering of product pricing. This illustrates a small business across rural Minnesota and I am sure other states also, that federal dollars are being used to subsidize private landowner, and thereby the small businessman is not able to compete because they offer a capped price on federal equipment which to me is not what we as taxpayers pay our money for.

**Michael Barrera:** Okay. Ed Bowman of the National Federation of Independent Businessmen.

**Ed Bowman:** Thank you very much I appreciate the opportunity of being with you this morning. I appreciate meeting you Mike. I wish you were there last night, we had the field hearing of the House Ways and Means Committee where Indiana is considering a tax reduction proposal that would dramatically reduce the tax on large corporations and substantially increase the tax on small business. We could have used your statements on the importance of small business to the economic climate of the state as that hearing unfolded last night. There was no question about that. I serve on the SBA advisory committee. I didn't know until today that Jan Wolfe had been appointed to the position. Congratulations to you Jan. You are just acting? Okay. The primary purpose of my being here is to put into record a publication of the NFIB Education Foundation that relates to regulatory reform. However in having the opportunity to talk to you I would like to make just a couple extraneous comments. I don't know if they are extraneous. NFIB is one of many organizations that has been supporting the repeal of the Internal Revenue Code, which as some of you who work for the IRS would know is a major undertaking. I think that part of the impetus for that came from some of the abuses that occurred by the Internal Revenue Service in their audit activity and I brought with me one of the books that we have talked about and many of you have seen by former Senator Bill Ross called the Power to Destroy, and so much of the gentleman's story the first chapter in this book, if you have not had the opportunity to read, deals with a New Hampshire attorney by the name of Bruce Barron and his wife Shirley, and they took a tax deduction of \$80,000 in the early '90's and subsequently an IRS audit that tax deduction was disallowed and with the penalties and interest the amount went up to \$225,000, and the Barrons couldn't pay that and so the auditors of the Internal Revenue Service, and it was clearly an abuse of power, they went to Bruce's clients and asked his client's to pay the Internal Revenue Service instead of the law firm, they placed a lien on the home, they sold a vacation home the couple had at a tremendous loss, the daughter had a \$300 savings account, her name was

Kerry and they attached the savings account, and Shirley worked at the library and they garnished her wages, and in August of 1996 Bruce came home from his law office and there wasn't anyone at home and he drove his car into the garage and closed the door behind him and left the engine running. He left a note which said "Killing myself is much more difficult than I thought it was going to be. Kerry will need everyone's love. I wish I could stay and see her continue to grow. There is no possible solution to this." He took his own life and that precipitated the action of the senate finance committee in 1997 that resulted in the 1998 IRS restructured reform act that I think has made some major, major improvements in terms of what is going on in this particular area, and when it comes to offers of settlement I think there are opportunities today that there weren't prior to this 1998 legislation which may be of direct benefit to you. One of the things that we experience is that totally apart from all of the rules and regulations and all of the stuff on paper there is a real human face to this. When Bruce Barron died it put a human face to this. About 10 years ago I received a call from a woman in Evansville, Indiana in southern Indiana and she was hysterical, absolutely hysterical. She and her husband had a small dry walling business and they were audited by the OSHA inspectors and the OSHA inspectors concluded that they were not doing the proper thing when it came to the ladders they had and the OSHA inspectors imposed on them a \$7,000 fine. For this very low income working family with six part-time employees that fine was enough to destroy them. She was hysterical when she called me. As a result of her call, I made arrangements to have legislation introduced in Indiana that would abolish the Indiana OSHA program and put it back under the federal OSHA supervision and I can tell you that I became persona non grata in the Governor's office real quick. The legislation didn't pass. However, there were a series of bills passed to curtail the kind of auditing power that was going on in the state OSHA system. The fact of the matter was I served on an advisory committee set up by the Governor and what we found out was that on all these OSHA penalties the actual amount that was being charged as it came up the line on hearing was less than 5% of what was being assessed by the auditor. The auditors were terrorizing these small businesses with these huge assessments but ultimately on appeal they would be 5% of these huge dollars and this drywall company was able ultimately to survive this. The fact of the matter is, and Michael I think if there is any need, I mean really need, it is not a question on what is on the statute books, and I am going to you, it is not what is on the statute books, it is not what is in the regulations, it is what is going on day by day in terms of the way people are interacting with people and the way these folks are doing their job and the attitude they are taking to the field as they are coming in with any of these audits. That is where we need the help. I serve as the president and have for 20 years of a group called the Indiana Legal Foundation. It is the equivalent of a public interest law organization like the Pacific Legal Foundation and one of the first cases we got into did not involve business. It is a conservatively oriented organization, in involved two brothers over in Terre Haute, the Havilland brothers and they

had their own farm and with their own farm they decided to be innovated and entrepreneurial and they began to strip mine their own farm. They were causing competition then with some of the larger mining companies. So they were reported to the Department of Labor and the Bureau of Mines swooped down on them and demanded that they for themselves, there were no employees just the two brothers, that they put on all these bells and whistles so that when the tractor backs up it honks and there is several devices you have to put out to know how much impact you are making on the ground, and then there is reclamation of the property and all of this. The Indiana Legal Foundation, these people didn't have money, the Indiana Legal Foundation funded their case and we were going into federal court to defend their right to use their own private property against the Bureau of Mines. Unfortunately before this was all said and done, the brothers just gave up and decided to go do something else with their lives and closed the business. Again it is a very live story in terms of the way small business folks are impacted by some things that are just grossly unreasonable relative to what is going on in the marketplace and the real world. I am running out of time. This is a publication of the NFIB Foundation and there is a chapter in here that deals specifically with government regulation and it talks about some of the issues that you have talked about in terms of the fact that government regulation for small business is substantially more costly than it is for the large organization and it talks about the importance of your office and the role it can play in intervening in these kinds of situations. With that I will leave some copies of this and if you have met some of our folks in our national office you can appreciate that if you want more copies we have at least a hundred or so to make available to you. In the meantime, I thank you for the opportunity to appear before you and I will be glad to attempt to answer any questions. Let me comment to you we have a leadership counsel in Indiana and many of the folks there are active with us have been participants in the White House conference. I think there was one in 1994, and then a couple of them before that. It is a wonderful experience that has brought a lot of people into activity with public policy organization.

**Michael Barrera:** Thank you very much. Any questions, comments? I think it is important to point out that trade associations are very informative in the regulatory fairness field, because maybe they can speak on small businesses behalf and they made a lot of comments that they actually been through which is a more powerful and are encouraged to work with trade associations to bring us these kind stories, individual stories.

**Ed Bowman:** I appreciate the information and we will contact your office. I know a restaurant that is currently under Department of Labor and they were too apprehensive to be here today. We will get some information to them. Thank you.

**Michael Barrera:** We have one more, John Livengood.

**John Livengood:** My name is John Livengood. I am President of the Restaurant and Hospitality Association of Indiana as well as the Indiana Hotel and Lodging Association and the Indiana Association of Beverage Retailers. All three trade associations representing small businesses in our state. I appreciate the plug for trade associations. Anybody in the room that needs a membership application I would glad to provide them with one. My comments are going to be very general. When Darrell first called and was talking about a roundtable and I think I probably would have been much more comfortable in that environment making these kind of general remarks than a full blown regulatory hearing because I don't bring any specific complaints or horror stories to you, although over the years we have helped our members with matters with the Department of Labor, Team Labor inspections, and OSHA problems and tried to play a role as a representative there whenever we could. I wanted to start however by thanking the Small Business Administration specifically for something it has done recently. That is in the wake of the tragic events of September 11<sup>th</sup>, the Small Business Administration extended their disaster loan program nationwide and I can tell you that that has meant a lot to a lot of folks. I have had calls in my office from people who have been in business in this community for years, who are good business leaders and corporate citizens who simply didn't know how they were going to pay their property taxes on October 10<sup>th</sup>. The bottom fell out all of a sudden in their business. No industry has been hit harder than travel, tourism and hospitality this year. They were hurting before September 11<sup>th</sup> and it just was an overnight disaster for them and we are very appreciative of the fact that the Small Business Administration took an unprecedented step in extending their program beyond just the bounds of the immediate disaster but to the whole nation and I wanted to express that today. Also wanted to...I guess my remarks are generally directed toward the importance of what you do. We recognize the importance of the Regulatory Fairness Act, the creation of your office back in 1996, now your fifth anniversary and I read in the literature that your folks provided to us here. And think of what you do is extremely important and that I represent the nation's largest private sector employer in our state. We employ more people than anybody in the private sector. Because I think we are all small individual businesses, or most of them are, we oftentimes don't get on the radar screen at least the state level of government entities when they are making public policy. Having somebody out there who is looking out for the interest of small business people is extremely important. Having said that, it is still true that federal paperwork mandates continue to burden America's small businesses according to the Office of Management and Budget paperwork requirements continue to increase despite the 1996 law that called for reduction in those mandates. That is why our industry is supporting legislation in congress HR 327 and Senate Bill 1271 which would strengthen the 1996 law by requiring annual publication of the federal paperwork requirements, establishing a contact at each federal agency for small businesses and requiring agencies to further reduce paperwork for small business with less than 25 employees. The legislation has been

endorsed by the Nation Restaurant Association and other small business organizations. I know that that is not the focus of this hearing, but I also know that federal agencies have a way of influencing the decisions of what to support and what not to support and as I work with state agencies at the State Capital I hope that we will have some sympathetic ears here in the room. I noticed that Congresswoman Carson's office was represented earlier, I hope they are listening as well. Small business, including restaurants, create the majority of jobs in America. Over 70% of eating and drinking places have less than 20 employees. The restaurant industry is the nation's largest private sector employer with 11.3 million people. Small businesses are working in good faith to comply with the endless red tape which consumes their workday while many federal regulations of businesses are important some of these regulations, including those dealing with paperwork are unreasonably difficult for small businesses without large legal staffs to understand. Addition relief is needed to allow America's entrepreneurial growth to continue. That really has been brought home to me in the 11 years that I have been doing what I have been doing. I am not an attorney and I don't have the benefit of that training, but I can tell you as I have tried to represent people in this industry I have been dismayed to have them one after another in the last 10 years say to me, some on our on board said I am quitting, I am out of here, I am closing my restaurant, I am getting out of this business. I got into it because it was fun. I am a people person. I enjoyed being in the front of the house with my employees. I'm a cook, maybe a chef involved with the day to day operations, but now I find I am spending all my time in my office dealing with federal and state and local government requirements. That is not what I got into this business for. Our industry has gone through a dramatic shift in recent years toward the chain environment. We have a number of wonderful chain members in the association and I am not here to disparage them, but I don't want to see an independent restaurant operator go by the wayside either and if those folks who are involved in the day to day operation of their restaurants, who regard their employees almost like family, maybe hug them too much under today's politically correct environment. Those folks need to find a way to survive and anything you can do, anything these agencies can do to make it easier would be appreciated. I am tempted to agree with former baseball commissioner A. Bartlett Giomoni that federal regulations represent a threat to the imaginative capacities of the American people second only to daytime television, a quote I ran across recently. But I know that is not true. I have worked hard as Ed has at the state legislature passing mandates and passing laws and understand that every one of these things is well intended. It is I think instructive though to stand back once in a while and look at the weight of them. The National Restaurant Association and our State Restaurant Association several years ago attempted to quantify just what the independent restaurant in Indiana has to deal and we came up with a list and I am sure we missed some of 190 laws, regulations, fees, things that these folks who have no Human Resource departments have no legal departments, have no compliance departments that they have to deal with.

It is no wonder I get a call from a restaurant in southern Indiana saying the Department of Labor is here and I have just violated all kinds of teen labor laws I had no idea existed and we help negotiate that through, but that is the kind of thing that happens to these people who are out there working hard every day. I went to the National Restaurant Associations website last night just to see what they were saying about the relationship with federal government and I found six links to major federal agencies that our industry deals with, the U.S. Department of Labor, Equal Employment Opportunity, U.S. Justice, Internal Revenue, U.S. Food and Drug Administration and the U.S. Social Security Administration just to name six of ones we do a lot of contact with; which reminds me, one of things I hope that you will allow me do is to link to your website through our website. I don't know whether that is permissible or not but it seems to me that you provide a resource which our members might find helpful and useful. I would like to make it easier for them to access your office. To talk about some specific regulations and laws that are of concern to us, and I won't go into great detail but I will mention them to illustrate the kinds of things we get involved with. I spent some time running around the State of Indiana fighting smoking bans in restaurants. I was just involved in a debate testifying on one in Muncie a week or so ago. To find out there is a group call ASRAY which is a kind of private accreditation authority which is considering establishing a standard which then might get incorporated into federal regulation by reference and then by reference into state building codes which just might negate all of our efforts to rationally debate this issue and make our point is distressing and something which I had no control over whatsoever might come down from on high to tell us and tell local governments what to do. I find that of concern. The teen labor regulations. I know we have a representative from the Department of Labor here. I have been involved three times now in amending Indiana's teen labor regulations, but because we can only regulate 16 to 17 year olds, the federal government regulates 14 and 15 year olds we are not able to change those regulations which have not changed I understand since the 1930's. Since we were an agricultural society and kids had to be home before it got dark. The world has changed. My daughter grew up babysitting to midnight and playing volleyball until almost that hour and I think some of those regulations need to be seriously looked at and updated to our modern day economy and way of life and finally the FDA food code which we recently adopted in our state, the model which is proposed by FDA. I recently have become a member of the council for food protection so that I can attempt to have some influence over those regulations that are then passed down to the state. One of the things we are working and on that one of the earlier testimony reminded me of this, that is the fact that I went unto the State Legislature this last year and was able to successfully argue for a law that would require every restaurant in this state to have somebody who is trained in food safety and we think that is a big step forward for food safety but then I find out that the people who inspect restaurants don't have to be certified with food safety, so we are now going back and saying that needs to be incorporated into the FDA model food code. I am getting

the hook over here so I will wrap up by saying there are a host of legal and regulatory issues from the business meal deduction issue that was the top priority of the white house small business conference and the white house conference of tourism. The need for better regulations to make food donations possible that Senator Lugar has been working on in our state from restaurants to food banks, immigration reform and labor shortage, music licensing, work opportunity tax credits, a whole host of things that we deal with that would make life a lot easier for restaurants if the federal requirements were eased or eliminated and we appreciate again your coming to Indiana on behalf of the hospitality industry and hope you found your stay here hospitable. I understand you come from the industry, did I hear that earlier and own a restaurant so you probably understand intuitively a lot of what I have been talking about here. It is frustrating for our members often times to deal with some of these issues and we appreciate your efforts to make it a little easier for them. Thank you.

**Michael Barrera:** Okay, any other comments? I want to thank everybody for coming down; and you are right I have been in the restaurant business and actually my father was with the Westin Hotels for 10 years so I really understand your business a lot. One thing I found about small business people is that titles don't mean anything. I remember my father...I kept complaining, Dad, I want to be manager of the restaurant. He said fine, you are the manager go mop the floor, because you realize in small businesses you have to do it all and the last thing you need is to have unfair burdens on you whether it be regulation or anything. That is one reason that Congress established this office and the president fully supports this is because we do know how tough it is for small businesses and what is important about these hearings is that we put the faces to the challenges that you have, so, these agencies can hear. I think a lot of the people here are committed to trying to be fair, but they need to hear the stories that you are bringing to us so they can take it back and see what we can do to change it and make sure it doesn't happen again. As Thomas was indicating, right now his Department of Labor and myself, and some other agencies are working on what we are calling a Basics of Equal Rights Card where a federal agent if he does go in to visit a small business tells them why he is there, what his name is, gives him the contact at the agency he is working with and gives him our name and number in case that small business feels they are not being treated fairly. We are trying to make that a requirement that all agencies and all agents inform a small business about our office because I think the more people know about it, I think if an agent knows that they have to give this information out they are going to have to treat them nicer. A lot of what we see is that some of the agents that are out there just don't treat people nice and we all have enough pressure right now, we don't need to have someone treat us unfairly or even the threat of retaliatory action is almost as bad as the retaliatory act itself. I remember growing up, one way my mother controlled me was to say wait until your father gets home. That in and of itself stopped me from doing things and that treat itself can be a diverting in and of itself. I have encouraged small businesses to

use a lot of the resources that are out there. Definitely use our office. Let us know what type of issues you are facing. Other federal agencies now are coming with compliance guides. I know the Department of Labor is coming up with different ones, IRS has come up with some they actually did in conjunction with the SBA. Use the SBDC's. We had representatives here earlier from Small Business Development Centers. They have training on how to comply with federal agencies. Use organizations like NFIB and some of your own trade associations to have them assist you in learning how to comply. Use the local SBA offices. The SBA offices have so much. They have so many weapons in these offices that you can use, not just for compliance issues but in having you obtain loans, having procurement opportunities. They have a lot of resources on how to establish a business or run your business. Use the SCORE people. These are retired executives and they will let you know whether or not you have a viable business plan or help you write a viable business plan. Actually Jan gave me a good story; she said a lot of times what they can help you is to tell you may not be ready to open a small business and that can save people tremendous amounts of money. They don't discourage you from opening one but they may let you know you may not want to do it right now because you may not be quite ready. Because those of you who have been in business know that it takes a lot to open a small business and it takes a lot to run that small business. Man, we all need a lot of help. Again, I really am a firm believer in helping small businesses. A lot of the federal agencies are slowly changing that environment. I think before SBREFA was stated we had so many more stories like Mr. Pierce's that are a travesty and they are tragic. I think the goal someday is that you don't need my office. That would be the ultimate goal that would be utopia. We are not ready for that yet. I certainly am not ready for that yet, but let's at least wait another three or four years before we get to that point. In all seriousness, if we can get to the point where we change an environment and let the government agencies know hey let's try to treat these small businesses as professionally and as fairly as possible. They are not asking for anything more than just to be treated fairly. Most small businesses are not out there to cheat anyone. They are not out there to try to get by. Most do want to cooperate and we have to provide them with an environment that they can cooperate without feeling pressured or feel that they are going to be punished for. With that I would encourage you all to try to get involved with your trade associations. Get involved with your elected officials whether it is federally or locally to make sure that they know about what is going on in your business lives.